

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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DE'MARIAN CLEMONS,

Case No. 2:11-cv-01442-MMD-GWF

Petitioner,

ORDER

v.

BRIAN WILLIAMS, *et al.*,

Respondents.

**I. SUMMARY**

This habeas matter is before the Court on Respondents' Motion to Vacate Stay and Reopen (ECF No. 35) and Motion to Dismiss (ECF No. 36). For the reasons discussed below, Respondents' motions are granted.

**II. BACKGROUND**

On February 20, 2013, the Court administratively closed this action while Petitioner exhausted his unexhausted claims in state court. (ECF No. 31.) The Court instructed Petitioner to file a state post-conviction petition or another appropriate proceeding in state court within 45 days of issuance of the Court's order. (*Id.*) The Court also instructed Petitioner to file a motion to reopen within 45 days of issuance of the remittitur by the Nevada Supreme Court. (*Id.*)

On September 8, 2013, Petitioner filed his state post-conviction petition. (ECF No. 36-1.) On December 6, 2013, the state court dismissed the petition as time-barred and successive, finding Petitioner failed to demonstrate good cause or prejudice. (ECF No. 36-2.) It does not appear that Petitioner appealed the dismissal of his state post-conviction petition. (ECF No. 36-4.) On July 5, 2018, Petitioner discharged his sentence to parole. (ECF No. 36-5.)

Notice of Respondents' motions was returned as undeliverable with a notation

1 indicating that Petitioner is not in custody and has been paroled. (ECF No. 38.) The Local  
2 Rules of Practice require all parties, including habeas petitioners, to immediately file with  
3 the Court written notice of any change of address. See LR IA 3-1, LR 2-2. The Local Rules  
4 also warn that failure to comply may result in dismissal of the action, with or without  
5 prejudice, or other sanctions as the court deems appropriate. See *id.*; see also *Carey v.*  
6 *King*, 856 F.2d 1439, 1441 (9th Cir. 1988). To date, Petitioner has not filed a notice of  
7 change of address or taken any other actions to prosecute this case.

### 8 **III. DISCUSSION**

9 Respondents request that the Court reopen this matter and dismiss the petition for  
10 writ of habeas corpus (ECF No. 4) for failure to prosecute. District courts have the inherent  
11 power to control their dockets and “in the exercise of that power, they may impose  
12 sanctions, including where appropriate ... dismissal of a case.” *Thompson v. Housing*  
13 *Auth.*, 782 F.2d 829, 831 (9th Cir. 1986). A court may dismiss an action, with prejudice,  
14 based on a party’s failure to prosecute an action, failure to obey a court order, or failure  
15 to comply with local rules. See, e.g., *Pagtulunan v. Galaza*, 291 P.3d 639, 643 (9th Cir.  
16 2002) (dismissal of habeas corpus petition with prejudice for failure to prosecute action  
17 and failure to comply with a court order).

18 In determining whether to dismiss an action for lack of prosecution, failure to obey  
19 a court order, or failure to comply with local rules, the Court must consider several factors:  
20 (1) the public’s interest in expeditious resolution of litigation; (2) the court’s need to  
21 manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring  
22 disposition of cases on their merits; and (5) the availability of less drastic alternatives.  
23 *Pagtulunan*, 291 F.3d at 642.

24 The Court finds the first two factors, the public’s interest in expeditiously resolving  
25 this litigation and the Court’s interest in managing the docket, weigh in favor of dismissal.  
26 Since a presumption of injury arises from the occurrence of unreasonable delay in  
27 prosecuting an action, the third factor, risk of prejudice to respondents, also weighs in  
28 favor of dismissal. See *Anderson v. Air West*, 542 F.2d 522, 524 (9th Cir. 1976). The

1 fourth factor, public policy favoring disposition of cases on their merits, is greatly  
2 outweighed by the factors in favor of dismissal. Moreover, Petitioner's failure to respond  
3 to the motion to dismiss or update his current address leaves the Court with no options  
4 of less drastic alternatives.

5 Petitioner has failed to comply with the Court's prior order by failing to file a state  
6 post-conviction petition or another appropriate proceeding in state court within 45 days of  
7 issuance of the Court's order and failing to file a motion to reopen within 45 days of  
8 issuance of remittitur. Petitioner has failed to comply with the Local Rules by failing to file  
9 a notice of change of address. Petitioner has failed to otherwise prosecute this action.  
10 Under such circumstances, there is no lesser alternative than dismissal of this action with  
11 prejudice.

#### 12 **IV. CERTIFICATE OF APPEALABILITY**

13 This is a final order adverse to Petitioner. Rule 11 of the Rules Governing Section  
14 2254 Cases requires the Court to issue or deny a certificate of appealability ("COA").  
15 Therefore, the Court has *sua sponte* evaluated the claims within the petition for suitability  
16 for the issuance of a COA. See 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851,  
17 864-65 (9th Cir. 2002). Under 28 U.S.C. § 2253(c)(2), a COA may issue only when the  
18 petitioner "has made a substantial showing of the denial of a constitutional right." With  
19 respect to claims rejected on the merits, a petitioner "must demonstrate that reasonable  
20 jurists would find the district court's assessment of the constitutional claims debatable or  
21 wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S.  
22 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable jurists  
23 could debate: (1) whether the petition states a valid claim of the denial of a constitutional  
24 right; and (2) whether this Court's procedural ruling was correct. *Id.*

25 Applying these standards, this Court finds that a certificate of appealability is  
26 unwarranted.

#### 27 **V. CONCLUSION**

28 It is therefore ordered that Respondents' Motion to Vacate Stay and Reopen (ECF

1 No. 35) is granted.

2 It is further ordered that Respondents' Motion to Dismiss (ECF No. 36) is granted.

3 It is further ordered that this action is dismissed with prejudice based on  
4 Petitioner's failure to comply with the Local Rules and his failure to prosecute this action.

5 The Clerk of Court is directed to enter final judgment accordingly and close this  
6 case.

7 DATED THIS 4<sup>th</sup> Day of April 2023.

A handwritten signature in blue ink, appearing to read 'Miranda M. Du', is written over a horizontal line.

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9 MIRANDA M. DU  
10 CHIEF UNITED STATES DISTRICT JUDGE  
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